IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

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**No. 73-1040**

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DISTRICT OF COLUMBIA, *et al.*,

*Petitioners,*

v.

MICHAEL H. MARSH,

*Respondent.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI


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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## REASONS WHY THE WRIT SHOULD NOT BE GRANTED

### 1. Pendent Jurisdiction

The first of four reasons why this Court should not issue a writ of certiorari in this case is that petitioner District of Columbia has at no time challenged below, or even discussed in its briefs, the exercise of pendent jurisdiction over a claim against it. Since *District of Columbia v. Carter*, 409 U.S. 418, was decided on January 10, 1973, this litigation has

been concerned with the requirement of $10,000 in controversy for federal jurisdiction. Petitioners have not raised the $10,000 issue in their petition for writ of certiorari and thus it is not before this Court. See Sup. Ct. R. 23(1)(c). Instead, petitioners have urged this Court to review a pendent party issue which was never considered in any way by the District Court below.[1] The Court of Appeals below, without prompting by the parties, included only a single sentence in its opinion in which it mentioned pendent jurisdiction. Thus, there has never been a thorough and thoughtful ventilation of the issue in the courts below—a prerequisite to proper consideration in the Supreme Court.

Indeed, as far as respondent is aware, the District of Columbia has never previously questioned in any suit whether claims against it should be subject to the pendent jurisdiction of the United States District Court in suits against police officers filed in that court. This is understandable, for in such cases the police officers are, along with the District itself, entitled to be represented by the District of Columbia Corporation Counsel in any event. D.C. Code Ann. § 4-143a(a)[2] This underscores the fact that to split

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[1] In Moor v. County of Alameda, 411 U.S. 693 (1973), this Court found it unnecessary to decide whether a district court should have pendent jurisdiction over the county because the district court had already found it inappropriate to exercise that jurisdiction. *Moor* suggests that this Court should at least await a case which poses the issue directly, *i.e.*, in which the district court has decided to exercise its jurisdiction over a pendent party. In this case the district court has not yet considered the point, because the issue had not been raised before the filing of the petition for writ of certiorari. Hence, this case presents an even less appropriate vehicle for resolving the "pendent party" question than did *Moor*.

[2] As a matter of local law the District of Columbia municipal corporation may be held vicariously liable in *respondeat superior* for any wrongdoing of its police officers. Wade v. District of Columbia, 310 A.2d 851 (D.C. Ct. App. 1973).

this suit between two courts and two trials would simply double the cost and produce no corresponding benefit, thus making the question presented an academic exercise having no practical benefit to petitioners.

Second, this case will not resolve the broader national issues of federalism posed by *Moor v. County of Alameda*, 411 U.S. 693, 710-15 (1973). Unlike *Moor* or any other suit against state police officers, political subdivisions of states, or states themselves, this case involves no question of federal-state relations and no issue of the role of federal courts in interpreting or enforcing the possibly unclear laws of other sovereign political units. Here, petitioners have merely asked this Court for an advisory opinion, which might have impact only in the District of Columbia, as to whether the claim against the District of Columbia should be heard in the federal court, where this action is pending, or in the District of Columbia Superior Court, the local court also established by Congress and located only four blocks away.

Third, the Court of Appeals decision below does not conflict with this Court's opinions in *Moor* and *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966), or with the overwhelming majority of lower courts that have considered the point. *Moor* noted that only the Ninth Circuit had fallen out of line with the decisions of the other circuits which held that the federal courts may exercise jurisdiction over "pendent parties," following the guidance of *Gibbs*. *Moor* provided the Ninth Circuit with an opportunity to correct its position by overruling its abberant decision, *Hymer v. Chai*, 407 F.2d 136 (9th Cir. 1969). Since *Moor* was decided in May 1973, the Ninth Circuit has not yet had a chance to reevaluate its position in the light of *Moor*'s criticism, although at least one district court in the Ninth Circuit has already refused to follow the shaky precedent of *Hymer*. See *Gaison v. Scott*, 59 F.R.D. 347 (D.

Hawaii 1973). Certainly, there is no need to grant the present petition merely to speak again to the Ninth Circuit, because "it seems likely that the conflict may be resolved as a result of future cases in the [Ninth Circuit Court] of Appeals . . . ." Mr. Justice Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States,* 33 Australian L.J. 108, 112 (1959).

Finally, there is no reason to consider the petitioners' contentions as to pendent party jurisdiction, because the complaint in this case (appendix c, petition for cert.) establishes the predicates for diversity jurisdiction under 28 U.S.C. § 1332(a) by alleging that respondent is a resident of the State of Massachusetts. Petitioners did not question the presence of diversity jurisdiction in the District Court, did not object after the respondent brought the diversity jurisdiction to the attention of the Court of Appeals below, and have not raised any such issue in their petition. Accordingly, with such an unchallenged independent basis for federal diversity jurisdiction and with no stay having been requested from this Court or in the courts below, it would be singularly inappropriate for this Court to impede the orderly progress of the present case through discovery towards trial in order to entertain petitioners' academic arguments which have little practical consequence at this stage in the litigation.

### 2. Ordinary Federal Question Jurisdiction

Petitioners also ask this Court to consider whether federal question jurisdiction under 28 U.S.C. § 1331(a) is narrower in the United States District Court for the District of Columbia than it is in any other district court. This request does not merit the Court's attention either.

Respondent's complaint duly alleged facts showing diversity jurisdiction under 28 U.S.C. § 1332(a) (appendix c, peti-

tion for cert. at 13a), which petitioners have not contested, and therefore even a holding that federal question jurisdiction does not exist would not affect the case.

In any case, respondent plainly and correctly invoked the District Court's federal question jurisdiction. Although his invocation of 42 U.S.C. § 1983 is no longer valid, *District of Columbia v. Carter, supra,* he alleged also that the action arose under various amendments to the Constitution of the United States and that he was deprived of his liberty, illegally seized, and deprived of his First Amendment rights to watch a public demonstration. See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971); *Bell v. Hood,* 327 U.S. 678 (1945). In *Carter* itself, this Court specifically observed that the inapplicability of 42 U.S.C. § 1983 did not foreclose a suit in federal district court against a District of Columbia police officer based on alleged deprivation of constitutional rights. 409 U.S. at 432-33.[3]

Section 1331(a) is clear on its face; it confers federal question jurisdiction on "the district courts." It does not make any exception for the District of Columbia. Nor did

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[3] Petitioners gain nothing from their characterization of this case as a "purely local civil rights matter" or from their assertion that the police officers were "acting in a purely local capacity." Whether respondent's claim states a cause of action under the Constitution is not identified as a question presented for review, nor is it fairly comprised in either of the questions that are presented. Sup. Ct. R. 23(1)(c). In any case, since state officers may be sued under 42 U.S.C. § 1983 and federal officers may be sued under the *Bell-Bivens* doctrine, we think it would border on the frivolous to suggest that District of Columbia police officers are the only policemen in the entire United States who cannot be sued in a federal court for violating the constitutional rights of citizens, and we do not take petitioners to be making such a suggestion.

Congress, when it recently spoke to that precise issue. In the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. 91-358, 84 Stat. 473 (the "Reorganization Act"), Congress substantially reorganized the courts of the District of Columbia and transferred to the local court system, in stages, most of the non-federal, article I business that had previously been handled by the District Court. See *Palmore v. United States*, 411 U.S. 389, 392 n. 2 (1973); S. Rep. No. 91-405, 91st Cong., 1st Sess. 19 (1969); H.R. Rep. No. 91-907, 91st Cong. 2d Sess. 34 (1970). What was to remain in the District Court was jurisdiction over certain enumerated items plus "its jurisdiction as a United States district court," D.C. Code §§ 11-501, 11-502;[4] Reorganization Act, § 111, 84 Stat. 476-77 (1970). Moreover, actions begun in the local court system which are removable under chapter 89 of title 28, U.S. Code, are specifically removable to the United States District Court for the District of Columbia, D.C. Code § 11-503, and a new provision (§ 1451) was added to chapter 89 expressly making the local court of the District a "state court" for removal purposes. Reorganization Act, §§ 111, 172(d)(1), 84 Stat. 478, 591.

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[4] These provisions are consistent with earlier editions of the District of Columbia Code which affirmed the federal question jurisdiction of the District Court for the District of Columbia. For example, the Act of March 3, 1901, § 84, 31 Stat. 1189, provided that the Supreme Court of the District of Columbia (the forerunner to the present Federal District Court and the Superior Court) "shall have and exercise the same powers and jurisdiction as the other district courts of the United States." *Cf.* O'Donoghue v. United States, 289 U.S. 516, 548 (1933); Claiborne-Annapolis Ferry v. United States, 285 U.S. 382 (1932); Federal Trade Comm'n v. Klesner, 274 U.S. 145 (1927).

In other words, Congress specifically addressed the jurisdiction of the District Court (and the U.S. Court of Appeals) in the District of Columbia and expressly preserved it,

> "confin[ing] the work of those courts to that which, for the most part, they were designed to do, namely, to try cases arising under the Constitution and the nationally applicable laws of Congress." *Palmore v. United States, supra,* 411 U.S. at 409.

The legislative history on the point is also clear: Senator Hruska, a co-sponsor of the bill, in presenting the Summary of Proposed District of Columbia Reorganization Act of 1969 and in introducing the legislation to the Senate, clearly stated that the Reorganization Act "preserves the federal jurisdiction of the District Court." 115 Cong. Rec. 19266 (1969); see S. Rep. No. 91-405, *supra,* at 5; H.R. Rep. No. 91-907, *supra,* at 34; 116 Cong. Rec. 24720 (1970).

Apparently, as this Court has stated previously in a different context, petitioners "recognize there is nothing in the wording or legislative history of section 1331 or in the decisions of this Court, which would indicate that there is any basis for the interpretation they would give that section." *Powell v. McCormack,* 395 U.S. 486, 516 (1969). They rely, therefore, on the legislative history of another statute, the Ku Klux Klan Act of 1871, 17 Stat. 13, 42 U.S.C. § 1983, to overcome that handicap. There are obvious limitations on the use of the legislative history of one statute to interpret another statute when they are "deriv[ed] from different constitutional sources." *District of Columbia v. Carter, supra,* 409 U.S. at 423, quoting from *Monroe v. Pape,* 365 U.S. 167, 205-06 (1961). These difficulties are accentuated here because the declared source of the Ku Klux Klan Act is the Fourteenth Amendment, which is applicable only to the states, not to the District of Columbia.

The constitutional foundation for section 1331(a) is article III, which of course applies as much in the District of Columbia as it does elsewhere.

Thus, the recent enactment of the Reorganization Act, plus recent and earlier decisions of this Court regarding the status of the courts in the District of Columbia, make it plain that the second question presented by the petition for certiorari does not warrant plenary consideration by this Court on the mere chance that the legislative history of the Ku Klux Klan Act, enacted over one hundred years ago, might conceivably suggest a different result.

## CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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